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Past-Verdict Motions under Rule 50: Protecting the Verdict-Winner

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Post-Verdict Motions Under Rule 50: Protecting the Verdict-Winner

I. INTRODUCTION

Rule 50 of the Federal Rules of Civil Procedure governs the process by which parties may move for post-verdict judgments in the district courts.[1] Thereunder, a party is permitted to

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1. FED. R. CIV. P. 50 reads as follows:

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) *Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. As amended Jan. 21, 1963, eff. July 1, 1963.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. As amended Jan. 21, 1963, eff. July 1, 1963.

(c) *Same: Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is *granted*, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion

move for a directed verdict at the close of the evidence offered by an opponent without waiving either his right to a jury trial or his right to introduce evidence should the motion be denied.[2] If the motion for directed verdict is denied, the case is deemed submitted to the jury subject to a latter determination of the legal sufficiency of the motion, provided that the losing party file his motion for judgment n.o.v. within ten days after entry of judgment.[3]

Rule 50 further provides that the motion for judgment n.o.v. may be joined with a motion for a new trial.[4] If this is done, the trial judge is faced with three alternatives: he may allow the judgment to stand; reopen the judgment and order a new trial; or reopen the judgment and direct the entry of judgment as if the previously requested directed verdict had been granted. If the judgment n.o.v. is granted, the trial judge must also make a conditional ruling on the new trial motion.[5] By this procedure a court of appeals will be afforded the benefit of knowing how the trial judge would dispose of the case in the event that his ruling on the judgment n.o.v. is reversed on appeal. If the motion for judgment n.o.v. is denied by the trial court, the party who prevailed on the motion may, as appellee, assert grounds entitling him to a new trial should the appellate court reverse the trial court's ruling on the judgment n.o.v.[6]

A reading of the relevant earlier cases which aided in the formation and subsequent interpretation of the provisions of Rule 50 seems to indicate a tendency to preserve the opportunity

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for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict. Added Jan. 21, 1963, eff. July 1, 1963.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. Added Jan. 21, 1963, eff. July 1, 1963.

2. *Id.* at (a).

3. Technically, the post-verdict motion with which this Note is concerned is a "judgment notwithstanding." However, since many writers refer to the motion as one for judgment n.o.v., the Note will employ this latter form of terminology for convenience. *See generally* J. MOORE, FEDERAL PRACTICE ¶ 50 (2d ed. 1953) [hereinafter cited as MOORE].

4. FED. R. CIV. P. 50(b).

5. *Id.* at (c)(1).

6. *Id.* at (d).

of the verdict-winner[7] to invoke the discretion of the trial judge for an *initial* ruling on his new trial motion, in the event that the verdict is reversed on appeal.[8] In two recent decisions, however, the position of the Supreme Court has become unclear. According to the decision in *Neely v. Martin K. Eby Construction Company*,[9] the verdict-winner, if he is reversed on appeal and if his situation is an "appropriate one," must urge the appellate court to grant him a new trial or he will lose this chance. Under the terms of *Iacurci v. Lummus Company*,[10] however, the verdict-winner is free to move for a new trial in the lower court even after losing his verdict on appeal, regardless of whether he requested a new trial at the appellate level.

It is the purpose of this Note to examine the relevant decisions in the area and to suggest a workable procedural format which both appellate courts and counsel could utilize in the event that the verdict-winner is reversed on appeal. Included is a discussion of the appropriate forum for initially disposing of new trial motions, as well as possible alternatives within the existing framework of the Rules.

II. THE RELEVANT DECISIONS OF THE SUPREME COURT

Since the Federal Rules replaced the use of local civil procedure in the federal district courts[11] with a uniform procedure, the Supreme Court has been the primary interpretive force. Therefore, an analysis of the decisions which have considered Rule 50 is basic to any attempt aimed at achieving a workable procedure within the framework and spirit of the Rule.

The genesis of case law under the Rule was in *Montgomery Ward & Company v. Duncan*[12] where the verdict-loser moved for judgment in accordance with its motion for directed verdict, or in the alternative, for a new trial. The trial judge granted

7. For the purposes of the Note, the term "verdict-winner" will be used to designate the party who has received a favorable determination in the lower court.

8. *See* Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1952); Weade v. Dichmann, Wright & Pugh Inc., 337 U.S. 801 (1949); Fountain v. Filson, 336 U.S. 681 (1949); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). These cases will be discussed in a subsequent section of the Note.

9. 386 U.S. 317 (1967).

10. 387 U.S. 86 (1967).

11. Conformity Act (Act of June 1, 1872, ch. CCLV, § 5; 17 STAT. 197).

12. 311 U.S. 243 (1940).

the judgment n.o.v. but declined to rule on the new trial motion.[13] On appeal,[14] the verdict-loser's judgment n.o.v. was reversed and the court of appeals rejected the argument that the cause be remanded for disposition of the new trial motion in the district court, ordering entry of judgment for the verdict-winner. Procedurally, the case can be represented as follows:

Montgomery Ward & Company v. Duncan,
311 U.S. 243 (1940)

	Trial Court		Court of Appeals	
	P	D	P	D
N/T	—	—	—	—
J. N.O.V.	—	+	—	O

Key:
+ — granted or affirmed
O — denied or reversed
— — not ruled upon

The Supreme Court reversed the appellate court and held that the case should have been remanded to the trial judge for a ruling on the new trial motion. In order to prevent the problem in other cases the Court's mandate, now embodied in Rules 50(c) and (d), required that in the future the trial judge initially rule on the motion for judgment n.o.v. and conditionally decide the new trial question in case the judgment n.o.v. should be reversed on appeal.[15]

13. The trial judge evidently felt that a disposition of the new trial motion was no longer necessary in view of the granting of the judgment n.o.v. motion. *See* 5 MOORE ¶ 50.13, at 2376.

14. Montgomery Ward & Co. v. Duncan, 108 F.2d 848, 853 (1940).

15. Rules 50(c) and (d) which were formally adopted in 1963, have placed the trial judge in an unenviable position: in essence, he must pass on the motion for new trial irrespective of the fact that he has granted a judgment n.o.v. It is virtually impossible for the trial judge to rule properly on the new trial motion without the knowledge of how the appellate court will rule on his treatment of the judgment n.o.v. motion. As Professor Moore notes in his treatise:

> He [the trial judge] must assume, for purposes of the judgment n.o.v., that the law, as read by the appellate court will support the judgment. On the motion for a new trial, he must assume that the appellate court's decision will not support the judgment

In *Cone v. West Virginia Pulp & Paper Company*,[16] the issue presented was whether an appellate court could enter a judgment n.o.v. for a party who had not filed this particular motion in the trial court. Following a denial of his motion in the trial court for a directed verdict, and the return of a jury verdict for plantiff, defendant moved for a new trial rather than moving under Rule 50(b) to have the verdict set aside and judgment entered in his favor. On appeal, it was held that the admission of certain evidence offered by plaintiff was prejudicial error and that without this evidence plaintiff's proof was insufficient to go to the jury. Consequently, the judgment was reversed with directions that judgment be entered for the defendant-appellant. The procedural history of the *Cone* case is as follows:

> n.o.v., but he obviously cannot know for what reasons the appellate court will not support the judgment. Nonetheless, it is clear that the Rule, as presently framed and interpreted, gives the trial court no freedom to abstain from passing on the motion for a new trial . . . .

5 MOORE ¶ 50.13 at 2379. *See also* Momand v. Universal Film Exch., 72 F. Supp. 469, *aff'd* 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 647 (1949). Professor Moore lists the following as the procedural effects of the *Montgomery Ward* rationale:

1. The trial court is required to make a ruling on the motion for a new trial even where it grants a motion for judgment notwithstanding the verdict.
2. If judgment n.o.v. is reversed and the motion for new trial conditionally granted, the new trial shall proceed unless the appellate court orders the contrary. The appellate court, however, may also reverse the conditional grant of a new trial.
3. If the conditional motion for a new trial has been denied, the party securing the motion for judgment n.o.v. may urge the reversal of this decision on the appeal without filing a cross-appeal.
4. Where motion for judgment n.o.v. has been granted, the opposing party may seek a new trial. But it is contemplated that he may urge the appellate court to order a new trial on his appeal from the entry of judgment n.o.v. even without making a motion for new trial in the trial court.
5. Where judgment has been entered on the verdict after denial of the motion for judgment n.o.v. and the conditional motion for a new trial, the prevailing party may urge that the appellate court, in the event that it reverses the trial court ruling on judgment n.o.v., itself order a new trial. The appellate court presumably has that power without being urged to do so by the appellee.

J. MOORE, MANUAL ON FEDERAL PRACTICE & PROCEDURE ¶ 22.11 at 1644 (1962) The following cases support the procedural variations offered by Professor Moore: Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1948); Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246 (9th Cir. 1957); Patterson v. Pennsylvania R.R., 238 F.2d 645 (6th Cir. 1956); Bailey v. Slentz, 189 F.2d 406 (10th Cir. 1951).

16. 330 U.S. 212 (1947).

Cone v. West Virginia Pulp & Paper Company, 330 U.S. 212 (1947)

	Trial Court		Court of Appeals	
	P	D	P	D
D/V		O		+
J. N.O.V.	—	—	—	+
N/T	—	O	—	—

Key:
+ — Granted or affirmed
O — Denied
— — Not ruled upon

The Supreme Court in *Cone* held that the appellate court lacked the power to direct entry of judgment where the appellant had failed to move for judgment n.o.v. under Rule 50(b).[17] The majority concluded that the appellee should not have his right to a new trial foreclosed without having had the benefit of the judgment of the trial judge on new trial issues.[18] Thus, the Court interpreted the Rule as permitting the trial judge to exercise the initial discretion of choosing between the alternatives open to him under the Rule.[19]

17. By its decision, the Court overturned the practically unanimous construction of Rule 50(b) by the various federal appellate courts. *See* Lowden v. Bell, 138 F.2d 558 (8th Cir. 1943); Howard Univ. v. Cassell, 126 F.2d 6 (D.C. Cir. 1941), *cert. denied*, 316 U.S. 675 (1942); United States v. Halliday, 116 F.2d 812 (4th Cir. 1941), *rev'd on other grounds*, 315 U.S. 94 (1942); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941). The Court, in effect, also rejected the position of the Advisory Committee on Rules for Civil Procedure. *See* PROPOSED AMENDMENTS TO RULES OF CIV. PROC. 63-5 (1946).

18. 330 U.S. 212, 217. The decision, it should be noted, created a basic inconsistency; even if the trial judge denies motions for both judgment n.o.v. and new trial, the appellate court is free to review and possibly reverse the denials. In essence, therefore, the appellate court can override the "discretion" of the trial judge. The Supreme Court, nevertheless chose not to curtail this *initial* power of the trial court, evidently basing their conclusion on the assumption that it would be prejudicial to the verdict-winner not to be permitted to move for a new trial or a voluntary dismissal with the trial judge *after* he has lost his verdict on appeal. *See* Comment, 47 COLUM. L. REV. 1077 (1947).

19. 330 U.S. 212, 215 (1947). For the choices open to a judge

After the decision in *Cone*, some appellate courts chose to limit the case to a situation where a court of appeals attempted to grant a verdict-loser's motion for directed verdict where no motion for judgment n.o.v. had been made.[20] *Globe Liquor Company v. San Roman*,[21] however, repudiated this interpretation of the *Cone* decision. The Court there held that the fact that a jury returned its verdict under the specific directions of the trial judge did not distinguish the case from *Cone*.[22] The action in *Globe* involved an alleged breach of warranty in the sale of liquor. The trial judge granted the plaintiff's motion for a directed verdict and entered judgment. The defendant had moved for a directed verdict which was denied; he had not moved for a judgment n.o.v. and his motion for a new trial was denied. On appeal, the decision of the trial court was reversed and the cause was remanded with instructions to grant the defendant's motion for directed verdict.[23] The decision of the appellate court, in effect, entered a judgment n.o.v. for the defendant. Procedurally, the *Globe* case appears as follows:

Globe Liquor Company v. San Roman,
332 U.S. 571 (1947)

	Trial Court		Court of Appeals	
	P	D	P	D
D/V	+	O		+
J. N.O.V.	—	O		
N/T	—	O		

Key:
+ — Granted
O — Denied
— — Not ruled upon or Not moved for

The Supreme Court reversed the decision of the appellate

when ruling upon a motion for judgment n.o.v. and in the alternative, a motion for new trial, *see* note 15 *supra*.

20. *See* 5 MOORE ¶ 50.12, at 2368.
21. 332 U.S. 571 (1948).
22. Globe Liquor Co. v. San Roman, 332 U.S. 571, 573 (1948).
23. Globe Liquor Co. v. San Roman, 160 F.2d 800 (7th Cir. 1947).

court insofar as it had directed the trial court to sustain the defendant's motion for a directed verdict. The Court held that the court of appeals lacked the power to enter judgment on defendant's motion for directed verdict since a motion for judgment n.o.v. had not been made at the trial court level, the procedure dictated by Rule 50(b).[24] As in the *Cone* decision, the

24. In Halliday v. United States, 315 U.S. 94 (1942), *rev'g* 116 F.2d 812 (4th Cir. 1941), and Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd on facts*, 312 U.S. 492 (1941), it was argued that if a judge made an express reservation of decision when he denied a motion for directed verdict, it would be sufficient to give the appellate court power to enter judgment n.o.v. even though the party had failed to move for it in the trial court. Under this analysis, the language which outlined post-verdict motions was designed merely to permit the losing party to obtain a reconsideration of his previous motion at the trial level. Therefore the judgment n.o.v. motion was not a necessary prerequisite to the granting of such a motion by the appellate court.

The advisory committee in 1946 proposed to amend Rule 50(b) so as to codify this procedure. Rule 50(b) was to have read as follows:

> (b) [Reservation Of Decision On Motion] *Motion For Judgment.* [Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.] Within 10 days after the reception of a verdict, a party who has moved for a directed verdict *at the close of all the evidence* may move to [have] *set aside* the verdict and any judgment entered thereon [set aside] and [to have] *for* judgment [entered] in accordance with his motion for a directed verdict; [or if a verdict was not returned, such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the] *The* court may allow the *verdict or* judgment to stand or may [reopen the judgment] *set it aside* and either order a new trial or direct the entry of judgment [as if the requested verdict had been directed] *for the moving party. The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered. If no verdict [was] is returned,* the court *on motion made within 10 days after the jury has been discharged* may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> *A motion for a new trial, as an alternative, may be joined with a motion for judgment. If the motion for judgment is granted, the court in its discretion may either refrain from ruling upon the motion for new trial or rule upon it by determining whether it should be granted if the judgment is thereafter vacated or reversed. The making of a conditional order on the motion for a new trial or the refraining from making such an order, does not affect the finality of the judgment. In case the alternative motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the alternative motion for a new trial*

Court's dicta again indicated that the question of whether a new trial should be granted to the plaintiff, now the losing party in the action, should be passed upon in the first instance by the trial court.[25]

The *Globe* and *Cone* decisions were criticized as being overtechnical, and this criticism was further heightened in *Johnson v. New York, New Haven & Hartford Railroad.*[26] Here the defendant moved for a directed verdict at the close of the evidence. The trial court specifically reserved a decision on the motion. The jury subsequently returned a verdict for plaintiff. In a post-verdict motion, defendant asked the court to set aside the verdict on the ground that it was "excessive, contrary to the law, to the evidence, and to the weight of the evidence."[27] The trial judge denied both the directed verdict motion he had previously reserved judgment upon, and the post-verdict motion. On appeal, the court of appeals held that a directed verdict should have been granted for the defendant, and remanded with instructions to enter judgment for the defendant. Procedurally, the *Johnson* case appears as follows:

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has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. In case the district court has refrained from ruling upon the motion for a new trial when granting the motion for judgment and the judgment is reversed on appeal, the district court shall then dispose of the motion for a new trial unless the appellate court shall have otherwise ordered.

See 5 MOORE ¶ 50.01 [8], 2307 (old material is bracketed; proposed amendments are italicized). REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS OF THE U.S. 62-63 (1946). This amendment was refused. 329 U.S. 843 (1946).

25. Globe Liquor Co. v. San Roman, 322 U.S. 571, 573-74 (1948).

26. 344 U.S. 48 (1952). Professor Moore calls this decision the "nadir of technicality." 5 MOORE ¶ 50.12, at 2370.

27. 344 U.S. at 49. The action was brought under the Jones Act for wrongful death. The defendant railroad had maintained that the employee's death could in no way be attributed to the railroad.

Johnson v. New York, New Haven & Hartford Railroad, 344 U.S. 48 (1952)

	Trial Court		Court of Appeals	
	P	D	P	D
D/V	—	O	—	+
Motion to set aside verdict as excessive and contrary to law and evidence.	—	O	—	
J. N.O.V.	—	—	—	+

Key:
+ — Granted
— — Not ruled upon
O — Denied or reversed

The verdict-loser in *Johnson*, unlike his counterparts in *Cone* and *Globe*, had made a post-verdict motion. But instead of moving for a judgment n.o.v., he moved to set aside the verdict as excessive and contrary to law and the evidence. Even if the majority reading of the motion is accepted, it had the effect of a motion for new trial only. The case then became procedurally identical to the *Cone* case. The Court held that the appellate court lacked the power to reverse and enter a judgment n.o.v. where the appellant, the verdict-loser in the trial court, failed to move specifically for a judgment n.o.v. In effect the *Johnson* decision required a party to employ a certain label and form when making post-verdict motions.[28]

The opinions of the Court which interpreted Rule 50 were criticized as being unnecessary sacrifices to procedural formality. In fact, however, all of the decisions are concerned with preserving the opportunity to the jury verdict-winner to have a new trial in the trial court if his verdict is reversed on appeal. The strict procedural guidelines can be argued to have been necessary

28. As Justice Frankfurter noted in dissent:
Our decisions do not suggest . . . that the party in whose favor a court of appeals directs a judgment *n.o.v.* is required to use a ritualistic formula.
Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 57 (1952).

to insulate the verdict-winner from the handicaps which could result from an adverse termination of litigation at the appellate level.

A verdict-winner may have preserved objections to a number of potential errors committed during the trial. He may have made mistakes himself in his arguments on admission or exclusion of evidence, or have cast the facts in terms of one of several alternative legal theories for recovery and the choice may have been ill-advised.[29] It is also possible that the testimony of a crucial witness could not be obtained due to lack of jurisdiction to compel an appearance. So long as the verdict-winner has his verdict, however, he will resist any motion for judgment n.o.v. or new trial by his adversary. He will want to retain his verdict, not lose it or risk it at another trial. Even if error has been committed in the trial court to his disadvantage, he is not interested in asserting that error so long as his verdict stands. If the trial court grants his adversary's motion for judgment n.o.v., the verdict-winner may within ten days move for a new trial under Rule 50(c)(2).[30] This procedure is desirable since it affords the verdict-winner the opportunity to invoke the discretion of the trial judge—the judge who saw and heard the case. It should be noted that there is no authorization under Rule 50(c)(2) for a verdict-winner to make a conditional motion for new trial. If the verdict-loser secured a reversal in the appellate court, the verdict-winner might have been foreclosed from presenting a motion for new trial to the trial court had the earlier decisions not insured this opportunity.

With the procedural history of the major opinions interpreting Rule 50 in mind, the cases can be considered in the context of the Court's apparent desire to preserve the chance of the verdict-winner initially to invoke the discretion of the trial judge on his new trial motion. It will be suggested that when considered in this light, the apparently "overtechnical" opinions take on a new cast.

Montgomery Ward & Company v. Duncan,[31] as noted previously, held that a trial judge must rule on both the judgment n.o.v. motion and the new trial motion. The decision necessarily preserved the right of the litigant to have the trial judge initially rule on the new trial question. The Court indicated that if a

29. *See* Petitioner's Brief at 131, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).
30. *See* note 1 *supra*.
31. 311 U.S. 243 (1940).

trial court erred in granting a judgment n.o.v. motion, the party against whom the verdict went was entitled to have his motion for new trial considered with respect to asserted substantial trial errors and matters which appeal to the discretion of the trial judge.[32] The decision, therefore, indicated that a verdict-winner, reversed on appeal, should be afforded the opportunity of moving for a new trial in the trial court as the trial judge, having heard and seen the case, was in the best position to rule upon the new trial motion. It is true that there is no language in the *Montgomery Ward* decision that is inconsistent with the *Neely* decision in that aspect of *Neely* which permits appellate courts initially to rule on new trial motions. However, the *Montgomery Ward* decision seems to assume that the trial court will be the first court to rule on such motions.

Cone v. West Virginia Pulp & Paper Company,[33] held that an appellate court lacked the power under Rule 50(b) to reverse and dismiss under circumstances where the verdict-loser had failed to move for judgment n.o.v. in the trial court. The *Cone* opinion noted that if an appellate court could enter judgment for a verdict-loser who had not moved for a judgment n.o.v. below, the verdict-winner would be foreclosed from obtaining a new trial in the lower court in order that he might repair any error which might have existed in his case.[34] This situation could arise where an appellate court finds that the instructions did not submit a portion of the evidence to the jury,[35] and that evidence may therefore not be considered in testing the sufficiency of the evidence.[36] By removing, in effect, some of the verdict-winner's evidence, the court of appeals then reverses on the ground of insufficiency of evidence. The trial judge, who saw and heard the case, could conceivably grant the verdict-winner's motion for a new trial, since the case in fact had sufficient evidence to warrant a favorable determination for the verdict-winner. If the court of appeals, however, is permitted to order entry of judgment, and thus foreclose the right of the verdict-winner to seek a new trial from the trial judge, the result could be highly unjust. The majority in *Cone*, therefore, stated that the determination of

32. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251-52 (1940).
33. 330 U.S. 212 (1947).
34. *Id.* at 217.
35. The author acknowledges that there is a split of authority over the question of whether a litigant who has not introduced evidence on one theory of liability has "waived" this right. An example of a decision where the principle of waivers was employed can be found in O'Hare v. Menck & Co., 381 F.2d 286 (8th Cir. 1967).
36. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

whether a new trial should be granted or a judgment entered under Rule 50(b) called for the initial judgment of the judge who saw and heard the witnesses and who had a feel for the case which no printed appellate transcript could impart.[37]

In the *Globe*[38] decision the Court was presented with a situation where each of the parties had moved for directed verdicts and the trial court had granted plaintiffs. Some critics argued that the post-verdict motion for a judgment n.o.v., which defendant had not in fact made, was implicit in the earlier motion for a directed verdict.[39] Others, such as Professor Moore, have contended that the Court's preference for the trial judge initially to rule on new trial motions was met in *Globe*, since the denial of the defendant's motion for directed verdict implied that the trial judge did not feel that a new trial was necessary.[40]

It is submitted that the criticism leveled against the *Globe* result is unwarranted. Many have failed to appreciate the apparent concern of the Court for the protection of the verdict-winner and *not* the verdict-loser.[41] If the verdict-loser, as in *Globe*, does not move for a post-verdict judgment n.o.v. and the appellate court reverses and orders entry of judgment for the verdict-loser, the verdict-winner is not afforded an opportunity to remedy any defect which the appellate court might discover in his case. If the verdict-loser had moved in the trial court for a judgment n.o.v., then the opportunity is afforded the verdict-winner in the trial court. This was the rationale adopted by the Court in the 1949 decision of *Fountain v. Filson*.[42] Here the trial court granted defendant's motion for a summary judgment under Rule 56 on the sole basis that New Jersey law would not permit the imposition of a resulting trust under the circumstances disclosed in plaintiff's complaint. The appellate court, after examining depositions, found the existence of a personal obligation owed by the defendant verdict-winner to the plaintiff. The action was remanded with instructions to order entry of judgment for plaintiff. The Supreme Court reversed the appellate court, holding that the defendant had had no occasion in the trial court to dispute the facts material to the claim that a

37. 330 U.S. 212 (1947).
38. 332 U.S. 571 (1948).
39. *Cf.* Halliday v. United States, 315 U.S. 94 (1942); Berry v. United States, 312 U.S. 450 (1941); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).
40. 5 MOORE ¶ 50.12, at 2369.
41. *See* Fountain v. Filson, 336 U.S. 681 (1949).
42. 336 U.S. 681 (1949).

personal obligation existed.[43] In effect, therefore, the *Filson* case, like the decision in *Globe*, held that a judgment n.o.v. could not be granted in the appellate court in favor of a party who had lost in the trial court and who had not there moved for such relief since it would unduly handicap the verdict-winner.

The criticism of the *Globe* opinion, that the denial of the defendant's motion for directed verdict had the effect of initially invoking the discretion of the trial judge on the new trial issues, also seems unsound. There are a multitude of reasons why a trial judge may deny a motion for directed verdict. He might want the case to go to the jury, or he may feel that the moving party is certain to win and that the granting of the directed verdict motion is therefore unnecessary. In any event, when a judge is faced with a motion for a directed verdict, his concern is over sufficiency of evidence, and not new trial issues. The denial of the defendant's motion for directed verdict in *Globe*, therefore, cannot be viewed as a disposition of new trial issues.

The past decisions of the Supreme Court arguably demonstrate that there are practical and cogent reasons for requiring strict adherence to the procedure specified in Rule 50. If the verdict-loser secures the equivalent of a judgment n.o.v. on appeal, and if he had not sought such a judgment in the trial court, the verdict-winner could be handicapped. First, his opportunity to invoke the discretion of the trial court for initial determination of new trial questions is foreclosed when the appellate court orders entry of judgment for the appellant verdict-loser.[44] Consequently, he is deprived of having the person best able to determine whether a new trial is necessary rule on his motion. Second, if an appellate court enters judgment for a verdict-loser, the verdict-winner is denied the opportunity to repair any error which might have existed in his case.[45] Third, if an appellate court orders entry of judgment where a verdict-winner's theory of liability is untenable, but where his evidence might be adequate on a different theory, he is denied the second chance to pursue this alternate theory in the trial court, since he cannot move there for a new trial.[46]

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43. *Id.* at 683.

44. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).

45. Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949); Fountain v. Filson, 336 U.S. 681 (1949); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).

46. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958); Fountain v. Filson, 336 U.S. 681 (1949); Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949). This argument assumes that the "waiver" principle will not be employed. *See* note 35 *supra.*

III. TWO RECENT DECISIONS

Two recent Supreme Court opinions raise questions about the continued preference[47] for preserving the opportunity of the verdict-winner to move for a new trial in the trial court. The first of these decisions was *Neely v. Martin K. Eby Construction Company.*[48] The petitioner in *Neely* had brought a diversity action in the district court for damages suffered due to the death of her father. The trial court denied the defendant's motion for directed verdict and sent the case to the jury.[49] A verdict was returned for the plaintiff, and the defendant's subsequent motion for judgment n.o.v. was denied. Also denied was defendant's alternative motion for a new trial. Plaintiff did not move conditionally for a new trial. The appellate court found that the evidence was insufficient to establish either proximate cause or negligence and it reversed with instructions to dismiss the action. Procedurally, therefore, the *Neely* case appears as follows:

Neely v. Martin K. Eby Construction Company,
386 U.S. 317 (1967)

	Trial Court		Court of Appeals	
	P	D	P	D
D/V	—	O	—	—
J. N.O.V.	—	O	—	+
N/T	×	—	×	—

Key:
+ — Granted
O — Denied or Reversed
— — Not ruled upon or Not moved for
× — No Motion

47. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958); Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949); Fountain v. Filson, 336 U.S. 681 (1949); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).

48. 386 U.S. 317 (1967).

49. In the *Neely* case the plaintiff alleged that the defendant's negligent construction, maintenance, and supervision of a scaffold used

The Supreme Court affirmed the appellate court and ruled that "in appropriate cases" an appellate court, after reversing the denial of the verdict-loser's Rule 50(b) motion for judgment n.o.v., could itself order dismissal or direct the entry of judgment for the verdict-loser.[50] In effect, the decision in *Neely* permits the appellate court, in appropriate cases, to rule upon the new trial question in the first instance.

Citing *Cone*,[51] the *Neely* Court stated that earlier decisions required that a court of appeals not grant a judgment n.o.v. The Court recognized that a court of appeals should not order entry of judgment under circumstances where the trial judge, due to his first-hand knowledge of the case, was in the best position to rule initially on the new trial question.[52] But the majority concluded that the above-mentioned consideration did not justify an ironclad rule whereby an appellate court could never order dismissal of a judgment.[53] The Court noted that the verdict-winner had three opportunities to raise a new trial motion: in the trial court after his adversary moved for a a judgment n.o.v.; in the appellate court where he defended his verdict; or in a petition for rehearing if the trial court was reversed.[54]

The Court in *Neely* seemed to depart from its earlier position. In an expansive reading of Rule 50, the Court for the first time held that consideration of the new trial question in the first instance could be found in the court of appeals.[55]

In *Iacurci v. Lummus Company*,[56] decided shortly after *Neely*, the defendant verdict-loser appealed after the trial court denied his motion for judgment n.o.v.[57] The appellate court,

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in the construction of a missile silo had proximately caused her father's fatal plunge from the platform. The trial judge, after denying the defendant's motion for directed verdict, submitted the case to the jury, which returned a verdict for the plaintiff for $25,000. The Supreme Court held that the record was insufficient to present new trial issues, and that since the appellee raised no such issues in her brief, the court of appeals could properly enter judgment for the verdict-loser. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 330 (1967).

50. *Id.* at 326-27.

51. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).

52. 386 U.S. at 325.

53. *Id.* at 326.

54. *Id.* at 328-29. The case also cites illustrative federal court rules of order under which each of these procedures could be taken.

55. *Id.* at 326-27.

56. 387 U.S. 86 (1967).

57. In the *Iacurci* action, the plaintiff alleged that the defendant's negligent design of a "skip hoist" proximately caused the death of her husband who was testing the device. The trial judge submitted the

as in *Neely*, reversed and ordered the entry of judgment for the verdict-loser. In this case, however, the Supreme Court reversed the court of appeals, holding that under the circumstances of this case the trial judge was in the best position to rule on the issue of a new trial ". . . in the light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers."[58]

The similarity in both the procedural and substantive aspects of the *Neely* and *Iacurci* actions has blurred the circumstances under which the verdict-winner must move for a new trial in the appellate court or lose this right. In both actions the defendant moved for a directed verdict and the motion was denied. In both actions the trial judge denied the defendant verdict-loser's motions for judgment n.o.v. In both actions the appellate court reversed on the ground of insufficiency of evidence to support a verdict for plaintiff. In spite of the striking similarities between the two actions the Court concluded one was an appropriate case for the appellate court to order entry of judgment and the other was not.

As Justice Harlan noted in his dissent in *Iacurci*,[59] the Court has evidently decided to interpose in each case its own judgment of the competence of the appellate court and the trial court to pass on the new trial motion. This ad hoc approach to the problem has placed the verdict-winner in the unenviable predicament of having no certainty in knowing when he must seek a new trial grant in the appellate court or lose this right.

IV. TRIAL COURT vs. APPELLATE COURT: WHICH IS THE PROPER FORUM FOR INITIALLY DISPOSING OF NEW TRIAL MOTIONS?

The order granting certiorari in *Neely*[60] directed the parties to consider whether Rule 50(d) and the past decisions of the

question of negligence to the jury by a special interrogatory which asked that, if they found negligent design of the skip hoist, they indicate which of five specific design aspects it had found unsafe. The jury returned a special verdict for petitioner but answered only one of the five subsections. The Court reversed the appellate court which had ordered entry of judgment for the verdict-loser, since it did not share the court of appeal's confidence as to the meaning of the jury's failure to answer other subdivisions of the interrogatory. Thus, in *Iacurci* the record indicated that the trial judge should rule on the new trial question. Iacurci v. Lummus Co., 387 U.S. 86, 87-88 (1967).

58. *Id.* at 88.

59. *Id.* at 88-89.

60. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

Court[61] permitted an appellate court to order dismissal of an action despite the provision of 50(c) giving the verdict-winner the right to move for a new trial where the trial court sets his verdict aside. In replying to this question the respondent argued that the basic authority for the appellate court to consider new trial motions was contained in section 2106 of the Judicial Code of 1948 which provides that an appellate court may direct the entry of ". . . such appropriate judgment . . . as may be just under the circumstances."[62]

Having thus established, as a legislative matter, the power of the appellate court, respondent argued that the earlier decisions of the Court did not bar its exercise. It read the *Cone*[63] and *Globe*[64] decisions as holding only that the appellate court did not have the power to order entry of judgment[65] where the verdict-loser had not moved for judgment n.o.v. in the trial court.[66] In the same way it confined *Weade v. Dichmann, Wright & Pugh Incorporated*[67] to holding that the appellate court could reverse for insufficiency of evidence,[68] dismissal at the appellate level being inappropriate only where alternative theories of negligence appeared on the face of the record.

The argument that section 2106[69] of the Judicial Code of 1948 conferred an authority upon the appellate court to order entry of judgment was first raised in the dissent of *Johnson v. New York, New Haven & Hartford Railroad.*[70] As Justice Black noted in his dissent in *Neely*,[71] section 2106 is concerned with

61. Those listed in the Court's order were: Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).

62. 28 U.S.C. § 2106 (1966).

63. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1946).

64. Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948). For a discussion of this case *see* note 21 *supra*, and accompanying text.

65. *See* Brief for Respondent at 19-20, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

66. Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949). The *Weade* decision involved the difficult area of actions reversed by an appellate court due to a finding of insufficient evidence. This line of cases was represented by Fountain v. Filson, 336 U.S. 681 (1949), in the discussion of the earlier Supreme Court decisions in section II of this Note.

67. Brief for Respondent at 23, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

68. This section is derived directly from § 24 of the Judiciary Act of 1789 (Act of Sept. 24, 1789, ch. 20, § 24; 1 Stat. 85).

69. Jensen v. New York, N.H. & H.R.R., 344 U.S. 48, 65 (1952).

70. 344 U.S. 48, 54 (1952).

71. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 339 (1967).

only the general power granted by the Congress to the appellate courts. Justice Black states:

> It begs the question to argue that it is appropriate for an appellate court in such circumstances to order a dismissal merely because § 2106 provides that a court of appeals may direct the entry of an "appropriate judgment."[72]

Moreover, dicta in the earlier decisions of the Court, as noted earlier, manifest definite concern for the protection of the verdict-winner who has suffered a reversal on appeal. The *Cone*[73] decision specifically stated that the determination of the new trial question called for a judgment in the first instance by the trial judge.[74] More important, however, was Justice Black's statement in *Neely* that the result in *Cone* would have been the same had the verdict-loser unsuccessfully moved for a judgment n.o.v. in the trial court.[75] In the *Globe*[76] decision the court extending the rationale in *Cone*, stated that the power to determine the new trial issue should initially be vested in the trial judge who saw and heard the case.[77] In the *Weade*[78] decision, the Court modified the decision of the appellate court which had ordered entry of judgment for the verdict-winner, so as to provide the verdict-winner with the opportunity to present his new trial motion to the trial judge.[79] Thus, the earlier cases have consistently indicated a preference for preserving the right of a verdict-winner who is reversed on appeal to invoke the discretion of the trial judge initially on the new trial question.[80] There is a basic inconsistency in favoring the right of a verdict-winner to move for a new trial in the trial court after losing his verdict on appeal, and allowing an appellate court to reverse and enter judgment against the verdict-winner. The latter ability necessarily precludes the operation of the former one. The earlier decisions of the Court would not have allowed an appellate court to reverse and order entry of judgment for the verdict-loser, even if there had been a post-verdict motion for judgment n.o.v. in the trial court.

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72. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).
73. *Id.* at 217.
74. *See* Justice Black's dissent in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 336 (1967).
75. Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948).
76. *Id.* at 572.
77. Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949).
78. *Id.* at 809.
79. Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1952); Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949); Fountain v. Filson, 336 U.S. 681 (1949); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).
80. *See* note 1 *supra.*

Rule 50(d), in addition to the Judicial Code of 1948 and the earlier decisions of the Court, does not lend itself readily to the interpretation that it grants to the appellate court the right to order entry of judgment and therefore foreclose the opportunity of the verdict-winner to move for a new trial in the trial court. Rule 50(d) outlines the procedure to be utilized when a motion for judgment n.o.v. has been denied by the trial court.[81] The rule permits the verdict-winner to urge the court of appeals to grant a new trial in the event his verdict is reversed on appeal. The majority in *Neely* concluded that Rule 50(d) was not simply permissive. Instead, the Rule empowered the appellate court to grant a new trial itself, to remand for a determination of the new trial issue in the lower court, or to order entry of judgment.[82]

Rule 50(d) does not, however, state that the verdict-winner can lose his right to invoke the discretion of the trial judge if his verdict is lost on appeal. The Rule provides that the verdict-winner *may* assert grounds for a new trial if the appellate court reverses his verdict.[83] The Rule also permits the court of appeals to grant a new trial or to remand with directions to determine whether a new trial is in order.[84] The majority in *Neely* interpreted this language as a grant of power to the appellate court to enter judgment in appropriate cases.[85] As Justice Black noted in his *Neely* dissent:

> The Court entirely overlooks the fact that the Rule is likewise *permissive* in the nature of its direction to the verdict-winner as appellee: it provides that the verdict-winner "may" ask the Court of Appeals for a new trial; it does not provide that he must do so in order to protect his right to a new trial.[86]

The purpose of Rule 50(d) is to assist the verdict-winner in protecting his rights. The *Neely* rationale, however, by permitting the appellate court to enter judgment after reversing the trial court, assists the verdict-winner in losing this right.[87] The procedure adopted in the *Neely* decision, recommended by the

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81. In this regard the Court stated:
> Rule 50(d) . . . emphasizes that "nothing in this rule precludes" the court of appeals "from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted" . . . [C]onsideration of the new trial question "in the first instance" is lodged with the court of appeals.

Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 323 (1967).

82. *See* note 1 *supra.*

83. *Id.*

84. *See* note 81 *supra.*

85. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 *passim* (1967).

86. *Id.* at 341 (emphasis added).

87. *See* Proposed Amendments to Rules of Civ. Proc. 63-6 (1946). For a text of the proposed rule see note 24 *supra.*

Rules Committee in 1946,[88] was identical to the procedure that the Court expressly rejected in the *Cone*[89] decision. When Rule 50(d) was adopted in 1963[90] there was not the slightest indication that it was intended to adopt the practice that the Court had found so objectionable in *Cone*.[91]

Even if it is assumed that the decision in the *Neely* case is correct, as a matter of interpreting the language of Rule 50(d), it is undesirable to have an appellate court rule upon most new trial questions in the first instance. Since the Rule clearly permits the appellate court to remand for determination of the new trial issue at the trial court level, it is urged that this be the policy that the appellate courts adopt.

Under Rule 50 the trial court possesses the power to dispose of new trial motions properly before it.[92] Ordinarily, the appellate court will not review the action of a trial court in granting or denying a motion for a new trial. Only in the rare instance where the court of appeals finds a so-called abuse of discretion by the trial court will it reverse the lower court's ruling.[93] Thus, as was stated in *Montgomery Ward & Company v. Duncan*,[94] if the trial judge grants a judgment n.o.v. and conditionally orders a new trial, his disposition of the new trial motion will ordinarily not be reviewable.[95] If the judgment is subsequently reversed on appeal, the case would then usually be governed by the lower court's award of a new trial.

The rationale behind the usual policy of not reviewing a trial court's disposition of a new trial motion is clear. First, it

88. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1946). In *Cone* the Court, swayed by their preference to protect the verdict-winner on appeal, rejected the procedure which at the time most of the appellate courts were following. *See* United States v. Halliday, 315 U.S. 94 (1942), *rev'g* 116 F.2d 812 (4th Cir. 1941) and Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).

89. *See* Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1946).

90. Rule 50(d) was added January 21, 1963, effective July 1, 1963.

91. *See* Justice Black's dissent in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 341 (1967).

92. *See* note 1 *supra*.

93. *See* Gelco Bldrs. v. United States, 369 F.2d 992 (1966); Sokol v. Gussack, 367 F.2d 576 (1966); Peter Kiewit Sons Co. v. Clayton, 366 F.2d 551 (10th Cir. 1966); Dupont v. Southern Pac. Co., 366 F.2d 193 (1966); Diapulse Corp. of America v. Bertcher Corp., 362 F.2d 736 (1966); McMullin v. Palmer, 40 F.R.D. 368 (1966).

94. 311 U.S. 243 (1940).

95. *See* Marsh v. Illinois Cent. R.R., 175 F.2d 498 (5th Cir. 1949). *See also* Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801 (1964).

is generally assumed that since the trial judge actually heard the case, he is in a position superior to the appellate court with respect to disposing of new trial motions initially. This same reason justifies a policy under which a verdict-winner, who prevailed on the motion for judgment n.o.v. at the trial level, should be allowed to move for a new trial in the trial court if he is reversed on appeal. The new trial issue is a factual one. As Justice Black, dissenting in *Neely* stated:

> Appellate tribunals are not equipped to try factual issues as trial courts are. A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold, printed record.[96]

A second reason for preferring the trial court is that the trial judge may order a new trial at his discretion, even in the absence of a motion by either party, while the appellate judge must find reversible error before he can do so.[97] This difference in power permits the trial judge to prevent error-free "miscarriages of justice." Assume, for example, that plaintiff's counsel is inexperienced and presents an extremely poor case, but the jury returns a favorable verdict. The trial judge, feeling that plaintiff's cause of action was sound, though poorly presented, denies the defendant's motion for judgment n.o.v. On appeal, the court finds a lack of sufficient evidence and reverses on the ground that the case should not have gone to the jury. Since the trial was otherwise error free, the appellate court may not order a new trial. Had the appellate court merely remanded with instructions to the trial judge to determine whether a new trial was proper, a different and more equitable result might have followed.

Finally, it is desirable to have the trial judge initially pass on the new trial question since it permits the verdict-winner to repair any evidentiary gaps that can develop due to the reversal of his verdict in the appellate forum. The danger of foreclosing the right of the verdict-winner to pursue an alternative course in proving his case is especially apparent in actions where the appellate court has reversed a verdict-winner who had more than one theory for defendant's alleged liability. *Weade v. Dichmann, Wright & Pugh, Incorporated*[98] is illustrative of this problem. There the plaintiff had secured a jury verdict. On

96. 386 U.S. at 337 (1967).
97. *See* 28 U.S.C. § 2106; Bryan v. United States, 338 U.S. 552 (1950).
98. 337 U.S. 801 (1949).

appeal, the court held that plaintiff's theory of liability was untenable and did not state a claim upon which relief could be granted. Accordingly, the jury verdict was reversed and the appellate court ordered entry of judgment for the defendant verdict-loser. The Supreme Court reversed the holding of the appellate court, ruling that the presence of an untenable theory of liability did not necessarily mean that the evidence was inadequate on another theory.

If the *Weade* trial court had found any evidentiary flaw in the verdict-winner's case, it might have granted the verdict-loser's post-verdict motion for judgment n.o.v. Then the verdict-winner would have had, under Rule 50(c), 10 days in which to move for a new trial. But there is no corresponding provision in the Rules for a motion in the appellate court for a new trial within 10 days after an appellate court decision holding that the verdict-loser's judgment n.o.v. should have been granted in the trial court. Under these circumstances Rule 50(d) provides that the verdict-winner, the party who prevailed on the judgment n.o.v. in the trial court, is entitled to assert in his brief as appellee grounds for a new trial in case his judgment is reversed.[99] However, this provision is likely to aid the verdict-winner only in situations where the trial court found the evidentiary flaws. Then the party who prevailed on the motion may argue in the appellate court that the exclusion of evidence by the trial court was error and that if any evidentiary gap is present in his case, the improperly excluded evidence would fill the hole.[100] But where the appellee has introduced its available evidence, all of which the trial court had accepted, a different circumstance arises.[101] The verdict-winner, under the *Neely* rationale, is expected to anticipate that the appellate court will punch a hole in his case by intentionally ignoring substantial portions of the evidence.

Even, therefore, if the *Neely* decision was correct in conferring upon the appellate courts the power to dispose of new trial questions initially, it does not follow that the appellate courts would be wise in utilizing this power. It must be conceded that at times a mandatory remand to the trial court will result in a "useless formality."[102] But since the Court in *Neely*

99. *See* note 1 *supra.*

100. Brief for Petitioner at 136, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

101. *See* Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963*, 77 HARV. L. REV. 801, 818-820 (1964).

102. *See* Gasman v. Metropolitan Life Ins. Co., 175 F.2d 24 (3d Cir. 1949).

offered no guidelines as to what is an "appropriate case" to remand, the only sensible and equitable policy under the present rules would be to remand under *all* circumstances. The interest in having the proper forum dispose of the new trial question simply outweighs the advantages of avoiding lengthy and at times unnecessary relitigation.

V. POSSIBLE SOLUTIONS WITHIN THE EXISTING FRAMEWORK OF THE RULES

A. The Unlimited Right to Move for a New Trial in the Trial Court Under Rule 50(c)(2)

Under Rule 50(c)(2) the party whose verdict has been set aside by a judgment n.o.v. may serve a motion for a new trial within 10 days after entry of the judgment n.o.v. The Rules Committee offered the following explanation for the provision: "Subdivision (c) (2) is a reminder that a verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course."[103]

The Rule, on its face, does not purport to dispossess the verdict-winner of this opportunity when the judgment n.o.v. is granted by the appellate rather than the trial court. The decision in *Neely* seems to foreclose any opportunity of the verdict-winner to invoke the discretion of the lower court on the new trial question after the appellate court has ordered entry of judgment against him. Since the decision in *Neely* permits the appellate court to *enter judgment*, it is unlikely that Rule 50(c)(2) allows the verdict-winner to urge the trial court for a new trial within 10 days after such judgment.

Also, no part of subsection (c) comes into play unless the trial court has *granted* a motion for judgment n.o.v. Therefore, subsection (c)(2) of Rule 50 cannot be construed to allow a party whose verdict has been set aside by direction of an appellate court to move for a new trial within 10 days. This conclusion seems inescapable in view of the Advisory Committee's statement which accompanies the Rule.[104]

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103. *See* note 1 *supra*.

104. The Rules Committee comment states:

Subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253 (1940), and have been further elaborated in later cases. *See Cone v. West Vir-*

B. VOLUNTARY NONSUITS UNDER RULE 41(a)

The argument can be made that allowing a plaintiff to take a voluntary nonsuit is a more desirable procedure to follow under the existing Rules than an expansive reading of Rules 50(c)(1) and (c)(2). Under Rule 41(a)(2), the trial judge, even after a verdict is returned by the jury, may grant a voluntary nonsuit.[105] The granting of a nonsuit is entirely within the discretion of the trial judge. Moreover, since a voluntary nonsuit may be granted without a motion by the parties,[106] the

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ginia Pulp & Paper Co., 330 U.S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Fountain v. Filson*, 336 U.S. 681 (1949); *Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

. . . .

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone v. West Virginia Pulp & Paper Co., supra*, 330 U.S. at 217, 218. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

. . . .

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial (emphasis added).

See Advisory Committee's Note of 1963 to Subdivision (c) in J. MOORE, MOORE'S FEDERAL PRACTICE RULES PAMPHLET 871-73 (1966) ¶ 50, spec. supp. 15 (1963).

105. Rule 41(a)(2) reads as follows:

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF . . . (2) *BY ORDER OF COURT*. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

106. Alamance Industries, Inc. v. Filene's, 291 F.2d 142 (1st Cir. 1961).

trial judge is free to utilize it on his own accord at any pre-verdict stage of the trial. While it is true that the order granting a voluntary nonsuit is reviewable,[107] the same is true with a new trial motion.[108] As with the disposition of a new trial motion, the judge under Rule 41 has the power to weigh the equities and do justice in each case.[109] Thus, Rule 41 dismissals could be employed as a protective device which the trial judge could employ to insure the right of a litigant to a new trial where justice so requires.

Rule 41(a)(2), however, will aid the verdict-winner only in a few circumstances. The Rule would certainly be applicable in a factual situation similar to *Weade*[110] where the court believes that there is a meritorious claim although there may be a technical failure of proof. The rule grants the trial judge the power when ruling upon a directed verdict motion under Rule 50, to "permit the claimant to dismiss without prejudice,"[111] and this interpretation of the Rule has been approved by the Supreme Court.[112] Also, a voluntary nonsuit could be used to prevent the error-free "miscarriages" of justice discussed earlier.[113] An alert trial judge, sensing that a party has a sound but poorly presented cause of action could order a dismissal without prejudice under Rule 41(a)(2). Similarly, a trial judge could employ the voluntary nonsuit device to aid a litigant who has chosen to pursue the wrong theory of liability.[114]

Rule 41(a)(2), however, is applicable where the trial has not

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107. Larsen v. Nordbye, 181 F.2d 765 (8th Cir. 1950).

108. *See* note 93 *supra.*

109. J. MOORE, MOORE'S MANUAL ¶ 19.03, at 1395 (2d ed. 1953).

110. Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949).

111. *See* 5 MOORE ¶ 41.05, at 1059. It should be noted, however, that under the current usage of the rule, a dismissal is seldom granted when the action has progressed beyond the trial stage. Under a literal reading of the rule, however, it is submitted that the trial judge may dismiss whenever he feels that it is in the interests of justice.

112. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).

113. This refers to the "elderly widow" hypothetical which is illustrative of the fact that while a trial judge is free to dismiss or grant a new trial at will, an appellate judge must first find reversible error in order to do so.

114. Rule 41(a) will also aid in the situation where an appellate court reverses, as in Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949), or Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958), on the ground that the evidence was insufficient. Since under the *Neely* rationale, the appellate court could then conceivably order a judgment, a verdict-winner who has adequate evidence but pursued an incorrect theory of liability is denied the chance to present their issues to the trial court.

yet resulted in a verdict.[115] For this reason it cannot be utilized as a device which either a judge or the parties could use in a post-verdict context to insure the disposition of new trial motions at the trial court level.

C. Require Both Parties to Make All Their Relative Motions in the Trial Court

Rule 50(b) provides that a motion for a new trial may be joined with a judgment n.o.v. motion, or a new trial may be requested in the alternative.[116] Rules 50(c) and (d) specify the necessary steps to be followed, representing a codification of the procedure delineated by the Supreme Court in *Montgomery Ward & Company v. Duncan*.[117] The trial judge may deny or grant both motions, grant the judgment n.o.v. and deny the new trial motion, or grant the new trial and deny the judgment n.o.v.[118] Therefore, if motions in the alternative are presented to the trial judge, he must rule upon the judgment n.o.v. and also upon the new trial motion.[119]

There is no specific prohibition under Rule 50 against requiring both parties to make all available motions at the trial level.[120] This would at least insure the verdict-winner of invoking the discretion of the trial court initially on his new trial question. But while such a procedure is possibly permissible under Rule 50, it would be disadvantageous for both the trial judge and the litigants.

In the first place, the present position of the trial judge is difficult even without requiring him to rule on both parties' motions. The trial judge's consideration of the new trial motion must proceed upon the assumption, as Rule 50(c)(1) states, that the grant of the judgment will be reversed by the appellate

115. Although a literal reading of Rule 41(a)(2) would permit a judge to grant a post-verdict nonsuit, the rule is only employed in pre-verdict situations.

116. *See* 5 Moore ¶ 50.13 at 2375.

117. 311 U.S. 243 (1940).

118. *See* 5 Moore ¶ 50.13 at 2378, and the following cases: Planters Mfg. Co. v. Protection Mut. Ins. Co., 244 F. Supp. 721 (N.D. Miss. 1965); Snipes v. Pure Oil Co., 186 F. Supp. 373 (W.D. La. 1960); White Pine Copper Co. v. Continental Ins. Co., 166 F. Supp. 148 (W.D. Mich. 1958); Feeney v. Stieringer, 162 F. Supp. 540 (W.D.N.Y. 1957).

119. It should be noted that where the trial court grants the judgment n.o.v., the grant of a new trial is only conditional upon reversal of the judgment. *See* 5 Moore ¶ 50.13 at 2378 and cases cited therein.

120. It is submitted however, that it would require a strained reading of Rule 50 to permit a verdict-winner to move conditionally for a new trial in the trial court.

court.[121] Professor Kaplan hypothesizes a situation where the ground of the new trial motion was that the verdict was against the weight of evidence. Consequently, the trial judge in granting the judgment n.o.v. held that the evidence was insufficient to go to the jury. Rule 50(c)(1) places the trial judge in the difficult position of *also* having to pass on the new trial issue before the appellate court informs him where he erred in viewing the evidence as insufficient.[122] As Judge Wyzanski noted in *Momand v. Universal Film Exchange*:

> It is doubtful whether the draftsman of the rules and the Justices who participated in the Montgomery Ward case realized in what a dilemma their rule might in some cases place a trial judge and what foresight, abnegation and stultification it might require of him. But this case serves as an illustration.[123]

Requiring all parties to make their motions at the trial level, therefore, would only add to the already complicated task facing the trial judge. The possible permutations confronting him with respect to each motion would be overwhelming.[124]

There is yet another reason why requiring both parties to make their motions at the trial level before appeal is undesirable. Once the verdict-winner obtains a favorable verdict, forcing him to argue for a new trial puts him at a strategic disadvantage.[125] He is concerned only with preserving the victory he has secured in the trial court. Moreover, if his new trial motion was granted by the trial court, the verdict-winner is placed in an unfortunate position under the Rules. A new trial order, if granted by the trial court, usually supersedes the appealable judgment.[126] Consequently, if the verdict-winner's

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121. *See* note 1 *supra.*

122. *See* Kaplan, *Amendments of the Federal Rules of Civil Procedure 1961-1963*, 77 HARV. L. REV. 801, 816 (1964). Professor Kaplan would prefer to grant the trial judge the discretion of refraining from passing upon the new trial motion until he is informed of the reasons behind the appellate court reversing his judgment n.o.v.

123. 72 F. Supp. 469, 483 (D. Mass. 1947), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

124. The trial judge must assume for the purposes of the judgment n.o.v. motion that the appellate court will agree with his finding. With respect to the new trial motion—a conditional grant—he must assume a unique position towards each litigant. For the losing party, he must decide whether to grant a new trial if the court of appeals reverses, for reasons unknown to him. With respect to the verdict-winner who prevailed on the motion for judgment n.o.v. he must also assume that his decision will be reversed on appeal; consequently he must treat this litigant's new trial motion as if he will lose on appeal.

125. *See* O'Hare v. Merck & Co., 381 F.2d 286, 299-95 (5th Cir. 1967) (dissenting opinion).

126. *Id.* at 295.

motion for a new trial is granted, under Rule 50, the verdict-winner is left with no opportunity to obtain review of his original judgment. It is true that the trial court could enter a conditional order of a new trial as well as granting the judgment n.o.v. under Rules 50(b) and (c), but even under these circumstances the plaintiff may be reluctant to move for a new trial because of the uncertainty that the order will be conditional.[127]

Therefore, while requiring all motions to be made at trial level is perhaps possible under the existing Rules, it is highly undesirable from the standpoint of both the trial judge and the verdict-winner. The trial judge would be faced with such a complex decision that it might well result in pure guesswork. The verdict-winner is faced with the possibility of losing his verdict to an unappealable grant of a new trial as well as the strategic disadvantage of being required to cast doubt upon the verdict by reciting errors in addition to those the loser raises.[128]

VI. POSSIBLE SOLUTIONS

Under the present state of the Rules, there is no device that the verdict-winner can employ to insure himself that he will have the chance to move for a new trial in the trial court in the event he loses his jury verdict on appeal. Rule 50(c)(2) is inapplicable since it applies only to situations where the trial court has granted a motion for judgment n.o.v. The use of the voluntary nonsuit under Rule 41(a)(2), while a useful tool at the trial level, does not aid the verdict-winner in the difficult situation created by the *Neely* decision. One possible solution would be to amend Rule 50 to provide that all conditional motions be made initially at the trial court level.[129] It is conceded that this will place the trial judge in an extremely difficult position as well as necessarily handicapping the verdict-winner in attempting to preserve his victory. Still, if *all* verdict-winners are forced to follow this practice the psychological and strategic disadvantages will gradually lessen in intensity. Moreover, this would give the verdict-winner the chance to invoke initially the

127. *Id.* at 295.

128. Brief for Petitioner at 13, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

129. While this procedure was perhaps contemplated by the Rule-framers, it is not clear from a reading of Rule 50. To read the present rule as permitting a verdict-winner to move conditionally for a new trial in the event he is reversed on appeal required a rather strained interpretation.

discretion of the trial judge on new trial issues.

More desirable, perhaps, would be a procedure under which the appellate court would remand for disposition of new trial issues only where such a policy is requested by the trial judge in the record. This will afford the trial court the opportunity to decide the new trial question initially in cases where it seems a possible injustice if the verdict is reversed on appeal. This procedure, unlike an amendment to Rule 50 providing that all motions be conditionally made at the trial level, would be capable of immediate implementation. Moreover, a trial judge, by indicating his preference on the record, will allow the verdict-winner to avoid assuming a stance contrary to his verdict. Finally, such a policy will be consistent with *Neely*, since the appellate court could still enter judgment in an "appropriate case." A notation in the record, however, might well afford the appellate court with a valuable guide for ascertaining which cases it should remand for disposition of new trial issues.

VII. CONCLUSION

By its mandate in *Neely*,[130] the Supreme Court departed from a long line of precedents which had sought to protect the rights of the verdict-winner on appeal. The departure was unfortunate. There are practical and cogent reasons why a verdict-winner should *always* be able to invoke the discretion of the trial judge on the new trial question. First, since the lower court saw and heard the witnesses, his disposition of the issue should be a more accurate one. Second, until his judgment is reversed, the verdict-winner's sole purpose is to protect the verdict which he obtained in the district court. Forcing him to urge errors sufficient to justify a new trial in his appellate brief, or in his petition for rehearing,[131] is inconsistent with that purpose. The verdict-winner's main contention on appeal —that the jury verdict was proper—could be vitiated by his simultaneous emphasis on errors in the trial.[132] Contradictory pleas and alternative motions in his appellate brief will only serve to cast doubt on the merit of his primary contention and confuse the appellate courts. Furthermore, the opposite results in the *Neely* and *Iacurci* cases, on similar facts and procedure,

130. 386 U.S. 317 (1967).

131. This procedure was specified in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

132. *See* O'Hare v. Merck & Co., 381 F.2d 286, 294-295 (5th Cir. 1967).

make it uncertain which cases will be "appropriate" ones for appellate court action. This lack of procedural clarity is contrary to the spirit of the Rules.

The decision in *Neely* did not remove from the appellate courts the power to remand to the trial court for determination of the new trial issue. They should, therefore, consistently adopt this procedure where necessary so that the verdict-winner's opportunity to move for a new trial at the trial court level will be preserved.